

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 61971-3-I
	)	
Respondent,	)	(Consolidated with
	)	Nos. 61972-1-I, 61973-0-I,
v.	)	and 61974-8-I)
	)	
MICHAEL EDMOUND JOHNSEN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	
	)	FILED: March 1, 2010

Leach, J. — Michael Edmound Johnsen appeals his conviction of felony possession of stolen property. He contends that we should reverse because (1) the information failed to show that the charge was brought within the statute of limitations and (2) the State presented insufficient evidence to prove beyond a reasonable doubt that he knew the vehicle in his possession was stolen.

We disagree. Johnsen waited until after the trial court's decision on the merits to challenge the information. Because the information defect does not raise a constitutional issue, Johnsen's challenge was untimely. We also hold that eyewitness affidavits placing Johnsen in the driver's seat of the stolen vehicle coupled with his denials of ever having driven the vehicle provide sufficient evidence from which a rational trier of fact could have inferred that he

knew the vehicle was stolen. We affirm.

## FACTS

On February 23, 2006, Dominick Vann reported his 1993 gold Honda Accord stolen. He had parked it in a parking garage at around 9:00 p.m. the night before and found it missing by 12:30 p.m. He still had his car keys when he reported the vehicle stolen.

Bellingham police officers found the vehicle in the Coachman Inn parking lot the next day. Plainclothes officers in unmarked cars placed it under surveillance while other officers contacted the Inn looking for possible witnesses. One witness, Shari Debeeld, who cleans rooms at the Inn, informed the officers that her boyfriend, Darren Baxter, who had helped her clean that day, saw the gold Honda Accord pull into the parking lot some time before noon. The police interviewed Baxter. Baxter reported that he saw a white male with a bald head park the vehicle and exit from the driver's side. Baxter also indicated that later that day he noticed the same man looking out of room 209 as marked police cars circled the Inn.

Just after 6:00 p.m., officers observed the gold Honda Accord leave the Coachman Inn. A white woman drove, and a white male rode in the passenger seat.<sup>1</sup> A marked car attempted to stop the driver of the stolen vehicle, but a

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<sup>1</sup> One officer observed a white male with a bald head approach the vehicle while another officer, the one who observed the driver and the passenger, was unable to identify the passenger.

high-speed car chase ensued. At some point, the driver of the Honda Accord hit two civilian vehicles. Because the chase was taking place in a high pedestrian area, the officers called off the chase before the suspects could be apprehended.

Officers returned to the Coachman Inn and interviewed additional witnesses. Thomas Viramontes informed the officers that Jamie Howerton and Michael Johnsen were the two people who left the Inn in the Honda Accord. Baxter and Jean Diemart, another Inn employee, identified Johnsen in a photomontage. Baxter also identified Johnsen as the white male with a bald head who had originally arrived at the Inn in the stolen Honda Accord. Not long thereafter, officers located, interviewed, and detained Johnsen. Johnsen admitted to being in the Honda Accord during the police chase but denied ever being in the vehicle before that time.

On March 1, 2006, the State charged Johnsen with one count of possession of stolen property in the first degree. The information alleged:

That on or about the 24<sup>th</sup> day of February, the said defendant, MICHAEL EDMOUND JOHNSEN, . . . did knowingly receive, retain, possess, conceal, or dispose of stolen property . . . , to-wit: 1993 Honda Accord, of a value in excess of \$1,500, knowing that it had been stolen and did withhold or appropriate the property to the use of a person other than the true owner or person entitled thereto; in violation of RCW 9A.56.150.

The case was stayed when Johnsen entered drug court in August 2006. Johnsen voluntarily terminated his participation in drug court in April 2008. One

month later, Johnsen stipulated to a bench trial on the possession of stolen property charge. At trial, Johnsen challenged the sufficiency of the State's evidence, comprised of various police reports, witness affidavits, and eyewitness identifications. The trial court found Johnsen guilty.

Immediately following the trial court's verdict, defense counsel asked the court to reverse it because the information did not state the year of the alleged offense. The court denied the motion:

I think the issue is untimely raised, but I also think there's sufficient information in the information as to what occurred and to identify when it occurred, and Mr. Johnsen would not, I think, be unable to provide, present a defense or to understand what he was charged with, and I will not grant that request.

Johnsen never requested a bill of particulars before the bench trial nor did the State move to amend the information.

Johnsen appeals.

#### STANDARD OF REVIEW

When a defendant challenges a charging document after the verdict or for the first time on appeal, the appellate court liberally construes all of the information in the document in favor of validity.<sup>2</sup> Whether the challenge is timely is a question of law that the appellate court reviews de novo.<sup>3</sup>

When reviewing a claim of insufficient evidence, the appellate court must

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<sup>2</sup> State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

<sup>3</sup> State v. Williams, 133 Wn. App. 714, 717, 136 P.3d 792 (2006) (citing State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995)).

determine, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>4</sup> The court draws all reasonable inferences from the evidence in the prosecution's favor and interprets the evidence most strongly against the defendant.<sup>5</sup> Circumstantial evidence is as probative as direct evidence.<sup>6</sup>

### ANALYSIS

Johnson challenges both the sufficiency of the information and the sufficiency of the evidence presented against him. As shown below, both challenges fail.

#### *Sufficiency of the Information*

Johnsen waited until after the trial court's verdict to challenge the information. The State argues that "[t]o the extent that Johnsen relies upon a statutory basis for his claim, he waived this argument by failing to object before the verdict." Johnsen counters that he did not waive his right to challenge the information since (1) the charging document's facial invalidity implicated due process, or (2) it raises an issue of the court's jurisdiction.

We first must decide whether Johnsen's challenge to the trial court proceeding was untimely. Washington has adopted the following federal

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<sup>4</sup> State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006).

<sup>5</sup> State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

<sup>6</sup> State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

standard of liberal construction in favor of the validity of a charging document when a defendant first challenges its sufficiency after verdict or on appeal: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?”<sup>7</sup>

The first prong of this test looks only to the face of the charging document, while the second may look beyond the document to determine if the defendant received actual notice of the charge.<sup>8</sup> In this way the test strikes a balance by discouraging the defense from postponing a challenge to a charging document it believes is flawed and insuring that the State has provided fair notice of the charge to the defendant.<sup>9</sup>

Johnsen maintains that the year is a necessary fact for purposes of the first prong. Thus, he claims that the information was facially flawed and prejudice should be presumed. We disagree. -

Johnsen conflates the difference between charging documents that contain constitutional defects and those that are vague for other reasons.<sup>10</sup> This

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<sup>7</sup> Kjorsvik, 117 Wn.2d at 105-06.

<sup>8</sup> Kjorsvik, 117 Wn.2d at 106.

<sup>9</sup> Kjorsvik, 117 Wn.2d at 106.

<sup>10</sup> See, e.g., State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985) (recognizing the difference between constitutional flaws and other nonconstitutional errors).

distinction is important. Our Supreme Court determined in State v. Kjorsvik that only challenges to the sufficiency of a charging document that implicate constitutional issues may be raised after the verdict or for the first time on appeal.<sup>11</sup> For this reason, the Kjorsvik court applied the two-prong test after it determined that an information omitting essential elements of a crime implicated due process.

Yet, the defect in the State's filing in this case derives from a pleading requirement rooted in long-standing statutory law and not from any constitutional requirement.<sup>12</sup> RCW 10.37.050(5) requires that charging document set forth sufficient facts to demonstrate that the statute of limitations has not expired. Unless time is an essential element, the State need not plead anything more specific.<sup>13</sup> And though time may be an element of some crimes, the expiration of a statute of limitations is not. Since Johnsen does not claim that he was inadequately apprised of the accusations made against him—indeed, he was notified of the year of the alleged offense in the supporting affidavit of probable

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<sup>11</sup> 117 Wn.2d 93, 107, 812 P.2d 86 (1991) (“[A] challenge to the sufficiency of a charging document can be initially raised on appeal ‘because it involves a question of constitutional due process.’” (quoting State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989))).

<sup>12</sup> See, e.g., State v. Osborne, 39 Wash. 548, 550-51, 81 P. 1096 (1905) (noting that the statute requires only a general allegation that the crime was committed before the filing of the information and within the statute of limitations (citing Bal. Code § 6845, now codified as RCW 10.37.050(5))); State v. Gottfreedson, 24 Wash. 398, 399, 64 P. 523 (1901) (holding that an information sufficiently complied with code requirements even though it failed to state the day and month the alleged crime was to have been committed).

<sup>13</sup> State v. Carver, 37 Wn. App. 122, 126, 678 P.2d 842 (1984).

cause—he does not show that the threshold issue of due process is involved.

Johnsen responds that the rule permitting challenges to constitutionally deficient charging documents is not limited to those missing essential elements of the crime. He cites State v. Ansell, claiming that the error in the information implicates the trial court’s jurisdiction, thereby providing a basis for challenging the information postverdict or on appeal.<sup>14</sup> He also analogizes the date defect to the failure to correctly identify the defendant in the charging document, a defect challenged successfully in State v. Franks.<sup>15</sup>

Johnsen’s reliance upon State v. Ansell is misplaced. Ansell was decided seven years before State v. Kjorsvik, where our Supreme Court expressly rejected the view that charging document challenges involve subject matter jurisdiction issues.<sup>16</sup> Instead, the sufficiency of a charging document can be challenged initially after verdict or on appeal when it involves a question of constitutional due process.<sup>17</sup> We remain bound by Kjorsvik.

Johnsen correctly cites State v. Franks for the proposition that a charging document pleading the essential elements of a crime, but otherwise

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<sup>14</sup> 36 Wn. App. 492, 496, 675 P.2d 614 (1984) (reaching a challenge to an information on the grounds that the information failed to allege facts tolling the statute of limitations because “[t]he statute of limitations is jurisdictional”).

<sup>15</sup> 105 Wn. App. 950, 22 P.3d 269 (2001).

<sup>16</sup> Kjorsvik, 117 Wn.2d at 108 (“Recent case law from this court has not viewed charging document challenges as involving subject matter jurisdictional issues, and we decline to adopt such a view.”).

<sup>17</sup> Kjorsvik, 117 Wn.2d at 107-08.

constitutionally defective, can be challenged. In that case, this court reversed an adjudication of guilt and remanded for dismissal without prejudice because the body of the charging document failed to identify the correct defendant. But, we decided Franks on constitutional due process grounds and expressly stated that the case did not present any issue of subject matter jurisdiction.<sup>18</sup> We emphasized the “primary purpose of the charging document is to inform the defendant of the nature of the accusations brought against her.”<sup>19</sup> Thus, a failure to accurately identify the defendant raises the same due process considerations as failing to include an essential element of the crime: the accused is neither appraised of the pending charges nor afforded an opportunity to prepare a defense.

In contrast, an information omitting the year of the alleged offense does not impact the defendant’s due process rights, so long as time is not an essential element of the crime. In most cases, the accused, accurately identified, remains fully informed as to the essential elements of the pending charges. Since omission of the year does not implicate due process, Franks provides no support to Johnsen.

#### *Sufficiency of the Evidence*

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<sup>18</sup> Franks, 105 Wn. App. at 957.

<sup>19</sup> Franks, 105 Wn. App. at 958 (a person accused of a crime has the right “to demand the nature and cause of the accusation against him” (quoting Wash. Const. art. I § 22)).

Johnsen claims that his conviction was based on insufficient evidence because the State failed to prove beyond a reasonable doubt that he knew the car was stolen. The State responds that the trial judge could properly infer knowledge from the witness affidavits placing Johnsen in the driver's seat the morning of February 24, 2006.

An essential element of the crime of possession of stolen property is knowledge that the property was wrongfully appropriated.<sup>20</sup> Though “mere possession of stolen property does not create a presumption that the possession is larcenous[,] [p]ossession is . . . a relevant circumstance to be considered with other evidence tending to prove the elements of the crime.”<sup>21</sup> Only “slight corroborative evidence of other inculpatory circumstances tending to show . . . guilt will support a conviction.”<sup>22</sup> Thus, an account of how the defendant acquired the stolen goods that is false or cannot be checked or rebutted is sufficient corroborative evidence to sustain a finding of guilt.<sup>23</sup>

In this case, a 1993 gold Honda Accord was reported stolen on February 23, 2006. The Honda had been taken from a parking garage some time after 9:00 p.m. on the previous evening. When the owner reported the Honda stolen, he still had possession of the car keys. At around 2:00 p.m., the next day, an

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<sup>20</sup> State v. Hatch, 4 Wn. App. 691, 693, 483 P.2d 864 (1971).

<sup>21</sup> Hatch, 4 Wn. App. at 694.

<sup>22</sup> Hatch, 4 Wn. App. at 694 (quoting 4 C. Nichols, Applied Evidence, Possession of Stolen Property § 29 at 3664 (1928)).

<sup>23</sup> Hatch, 4 Wn. App. at 694.

officer identified the stolen Honda parked in the Coachman Inn parking lot. Eyewitness statements were taken, and one eyewitness, Baxter, observed Johnsen pull into the Coachman Inn parking lot some time between 11:00 a.m. and noon. Johnsen, however, denied that he ever drove the vehicle and claimed that he walked to the Coachman Inn that morning. At around 6:00 p.m., Johnsen and a companion got back in the car and drove away. Law enforcement officers attempted to stop the vehicle, but the female driver eluded law enforcement, setting off a high-speed chase through a high pedestrian area. When Johnsen was eventually apprehended, he admitted that he was in the car during the police chase.

In light of these facts, we conclude that the record contains sufficient corroborating evidence to prove Johnsen's knowledge that the car was stolen. The rule is that "giving . . . a false explanation or one that is improbable or is difficult to verify in addition to the possession is sufficient [to support guilt]."<sup>24</sup> From Baxter's testimony a jury could find that Johnsen's account that he walked instead of drove to the Inn was false.

Johnsen counters that because he provided no explanation at all regarding the acquisition of the Honda Accord, no conflict with the evidence in

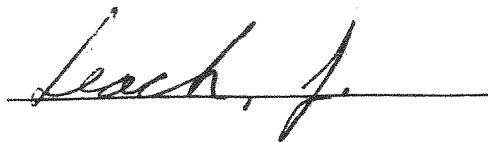
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<sup>24</sup> State v. Ladely, 82 Wn.2d 172, 175, 509 P.2d 658 (1973); see also Hatch, 4 Wn. App. at 694 ("Possession of recently stolen property and a dubious account concerning its acquisition is sufficient . . . to meet the 'beyond a reasonable doubt' test of criminal evidence.").

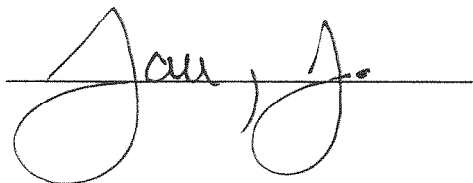
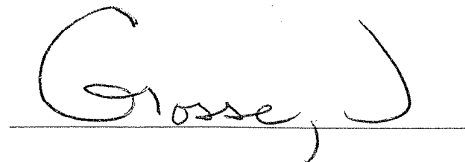
record exists that would otherwise warrant an inference of guilt. But this ignores Johnsen's statement to the police that he did not drive the Honda to the Inn. A trier of fact could reasonably believe Baxter and conclude that Johnsen lied to the police about his acquisition of the Honda. The proper inquiry is whether slight corroborating evidence supports a guilty verdict, not whether the defendant admits the truth of this corroborating evidence.

#### CONCLUSION

Because the information irregularity does not raise a constitutional issue and because Johnsen waited until after the trial court's verdict to assert it, we hold that Johnsen's challenge to the information was untimely. We also hold that a rational trier of fact could have fairly inferred that Johnsen knew the vehicle was stolen from the evidence the prosecution presented at trial. We affirm.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Jan, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Grosse, J.", written over a horizontal line.